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No.

77-1463

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

SADIE E. COLE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

SADIE E. COLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on November 14, 1977. On February 3, 1978, Mr. Justice Brennan extended the time

within which to file a petition for a writ of certiorari to and including April 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether tenants who are ordered to vacate a housing project that has been conveyed to the Department of Housing and Urban Development after default by the project's sponsor are "displaced persons" entitled to relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, where the order to vacate is unrelated to the Department's acquisition of the property.

STATUTE INVOLVED

Section 101(6) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. 4601(6), provides:

The term "displaced person" means any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; * * *.

STATEMENT

The Sky Tower apartment complex in Southeast Washington, D.C., was built in the 1950s. The 19 buildings in the complex contained 217 small "garden"

apartments. In 1970, a nonprofit corporation purchased Sky Tower and attempted to rehabilitate the complex by converting the units into larger apartments intended for low and moderate income families. The Department of Housing and Urban Development provided assistance to the corporation and the tenants by insuring the mortgage on the complex, subsidizing the mortgage interest payments, and paying rent supplements for a number of the households (App. A, *infra*, pp. 2A-3A).

In spite of this assistance, the rehabilitative effort failed. After the original general contractor defaulted on performance of the rehabilitation work, the Department took the unusual step of permitting an increase in the amount of the insured mortgage, along with a substitution of contractors. But the second contractor also abandoned work and, in addition, placed a lien on the property, whereupon the mortgagee declared the nonprofit owner in default and foreclosed (App. A, *infra*, p. 3A). Then the mortgagee, exercising its rights under the mortgage insurance contract, conveyed title to the project to the Department in exchange for the statutory mortgage insurance benefits. The Department took title in June 1973 (App. A, *infra*, p. 3A).

The Department hired a management firm to operate the project and executed new month-to-month leases with the tenants on the same terms as their previous leases. By September 1974, however, the Department determined that in view of the deteriorated

condition of the project, further efforts at rehabilitation would be futile. Department officials decided that the project should be demolished and the property sold (App. A, *infra*, p. 3A). Accordingly, in September 1974 the management firm gave notice to the remaining 72 families residing in Sky Tower to vacate their apartments. Tenants who were current in their rent payments were granted \$300 for moving expenses and were exempted from their last month's rent (App. A, *infra*, pp. 3A-4A).

Respondents, a group of Sky Tower tenants, then brought this action in the United States District Court for the District of Columbia, challenging the Department's decision to raze Sky Tower rather than rehabilitate it and seeking injunctive relief and damages. One of their claims was that the Department had failed to provide them with benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Relocation Act), 84 Stat. 1894, 42 U.S.C. 4601 *et seq.* (App. A, *infra*, p. 4A).

The district court issued a preliminary injunction barring the Department from further demolition or evictions at the project, requiring it to rehabilitate certain of the buildings, and ordering it to offer the tenants who had moved out the opportunity to move back in at the Department's expense (App. A, *infra*, pp. 4A-5A).¹ *Cole v. Lynn*, 389 F. Supp. 99 (D. D.C.).

¹ Only 18 of the 55 families who had vacated the project pursuant to the order elected to return after the injunction was entered (App. A, *infra*, p. 18A).

After extended proceedings in the district court and the court of appeals, the Department reached an agreement with the District of Columbia government under which Sky Tower would be transferred to the District of Columbia, with the Department providing substantial subsidies for its continued operation (App. A, *infra*, p. 7A n. 17).

Meanwhile, both parties moved for summary judgment on respondents' claim that the tenants who had vacated their apartments were entitled to Relocation Act benefits. The district court granted respondents' motion in part (App. C, *infra*, pp. 52A-54A), holding that tenants who had vacated their apartments as a result of the Department's notice to quit were entitled to a prorated portion of the Relocation Act benefits covering the period between the time they left the project and August 1, 1975, the date that they were permitted to return under the district court's injunction (App. A, *infra*, p. 7A).

The court of appeals affirmed in part and reversed in part, with one judge dissenting (App. A, *infra*, p. 19A). The court held that the tenants who left Sky Tower after receiving the Department's notice to quit were "displaced persons" within the meaning of Section 101(6) of the Uniform Relocation Act, 42 U.S.C. 4601(6), and were therefore entitled to the Act's benefits. In addition, the court held that those tenants who did not return to Sky Tower when the district court's injunction made their return possible were nevertheless entitled to full Relocation Act benefits, not prorated benefits terminating when they could

have returned to the project, as the district court had held (App. A, *infra*, pp. 17A-19A).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals in this case conflicts with the decisions of three other courts of appeals on an important question under an important statute, the Uniform Relocation Act.

The Act provides a variety of benefits to persons who meet the statutory requirements for eligibility as "displaced persons." Under specified circumstances, the Act provides "moving and related expenses," 42 U.S.C. 4622; "replacement housing payments" of up to \$15,000 for homeowners and \$4,000 for tenants, 42 U.S.C. 4623, 4624; and "relocation assistance advisory services," 42 U.S.C. 4625. The definition of "displaced person" is contained in Section 101(6) of the Act, 42 U.S.C. 4601(6), which provides in relevant part:

The term "displaced person" means any person who * * * moves from real property * * * as a result of the acquisition of such real property, * * * or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; * * *.

The definition contains two clauses: the "acquisition clause," which reaches those who move as a result of an actual acquisition of property for a program or project undertaken by a federal agency,

and the "written order clause," which reaches those who move as a result of a written order by the acquiring agency to vacate the premises for a federal program or project, even where the proposed acquisition never takes place.

The principal issue presented by this case is whether the written order clause applies only to tenants who are directed to vacate in connection with an acquisition or proposed acquisition of property, or whether that clause extends the benefits of the Act to all tenants who are ordered to vacate property previously acquired by a federal agency. A second related issue involves the meaning of the phrase, "for a program or project undertaken by a Federal agency," which designates the purpose for which the acquisition (or, on one view, the written order) must be intended.

On the first issue, the decision of the court of appeals here is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Alexander v. U.S. Department of Housing and Urban Development*, 555 F. 2d 166, petition for writ of certiorari pending, No. 77-874,² and with the decision of the Court of Appeals for the Eighth Circuit in *Harris v. Lynn*, 555 F. 2d 1357, affirming 411 F. Supp. 692 (E.D. Mo.), certiorari denied, October 31, 1977 (No. 77-5233).

² In our Brief for the Respondent in No. 77-874, we have suggested that the petition in that case be considered together with the present petition. As stated there, we do not oppose the granting of the petition in that case together with our petition here.

The court below held that respondents were "displaced persons" under the written order clause because the Department "acquired" Sky Tower within the common meaning of that word" (App. A, *infra*, p. 9A)—thus becoming, in the court's view, the "acquiring agency" within the meaning of Section 101 (6)—and because the Department subsequently gave the tenants written orders to move (App. A, *infra*, pp. 9A-10A). For both the Seventh and the Eighth Circuits, however, that is not enough. Those courts read the Act as requiring that the order to vacate be issued in connection with an acquisition or contemplated acquisition of property. See *Alexander v. U.S. Department of Housing and Urban Development*, *supra*, 555 F. 2d at 170; *Harris v. Lynn*, *supra*, 411 F. Supp. at 695, opinion adopted, 555 F. 2d at 1359. It is not enough, in their view, that the tenants be ordered to vacate property previously acquired by a federal agency.

On the second issue, the decision below conflicts with the Seventh Circuit's decision in *Alexander* and with the decision of the Court of Appeals for the Second Circuit in *Caramico v. Secretary of the Department of Housing and Urban Development*, 509 F. 2d 694. The court below held that the written orders to quit were issued "for a program or project undertaken by a Federal agency" because they were issued in anticipation of the demolition of Sky Tower (App. A, *infra*, p. 10A).³

³ "Moreover, it is clear that the Sky Tower tenants were ordered to vacate their apartments 'for a program or project undertaken by a Federal agency,' namely, the demolition of the buildings" (App. A, *infra*, p. 10A).

Again, the other courts read the statute to require more. The Seventh Circuit stated in *Alexander* (555 F. 2d at 170):

We fail to see how a decision to terminate a project can itself become a project in the absence of some indication that the decision to terminate and the order to vacate constitute a prelude to some governmental undertaking amounting to a program designed for the benefit of the public as a whole.¹⁴¹

And the Second Circuit in *Caramico*, interpreting the acquisition clause, held that the federal government's involuntary acquisition of property by the operation of mortgage insurance provisions is not an acquisition "for a program or project undertaken by a Federal agency" within the meaning of the Act. The court stated (509 F. 2d at 698-699):

Thus, it is clear that the Act contemplates normal government acquisitions, which are the

* The court of appeals here attempted to distinguish this holding of *Alexander* on the basis that there the Department "had made no plans for the future of the buildings," whereas here the demolition of Sky Tower was intended to help "eliminate blight" and to lead to revitalization of the area (App. A, *infra*, p. 11A n. 27). The court here appears to have squarely held, however, that the demolition itself constitutes "a program or project" within the meaning of the statute (App. A, *infra*, p. 10A). Moreover, since purposes such as eliminating blight and revitalizing the area presumably attend most if not all governmental decisions to demolish deteriorating housing projects, the asserted distinction seems unlikely to reflect any difference in fact. (In *Alexander* the purposes were simply undisclosed. The plaintiffs "point[ed] out that the purpose behind HUD's decision to order the tenants to vacate Riverhouse is undisclosed from the record, and that the Secretary has several options: rehabilitation, demolition, or sale of the facility." 555 F. 2d at 170.)

result of conscious decisions to build a highway here or a housing project or hospital there. In such cases, the acquisition of property and the relocation of certain individuals is a necessary first step in the project. Default acquisitions by the FHA, however, embody no conscious governmental decisions at all. * * * In fact, the default acquisition may be said to represent a failure of the FHA program rather than its desired result.

Resolution of the differences between the court below and the other courts of appeals is important to the administration of the Relocation Act. Under the view adopted by the court below, relocation benefits under the Act would be available, in general, to all tenants who were ordered to move by a federal agency (or by a state or local agency acting with federal financial assistance). Under the view adopted by the other courts of appeals, benefits would be available under the Act only if the tenants were ordered to move in connection with the acquisition or contemplated acquisition of the property, and only if the required connection with "a program or project undertaken by a Federal agency" was also present.

The difference between the two interpretations of the Act has considerable practical significance with respect to involuntary federal acquisitions such as the one involving Sky Tower. The Department of Housing and Urban Development has been required, under mortgage insurance contract agreements of the

kind involved here, to take title to a large number of housing developments that have come under default. The Department anticipates that this necessity will continue. Resolution of the question whether the Relocation Act applies to orders to vacate issued by the Department to tenants residing in such involuntarily acquired properties, at any date subsequent to the acquisition, is essential to enable the Department to weigh the human and material costs of demolishing a failing project rather than allowing it to continue deteriorating or devoting further resources to what has been an unsuccessful effort to rehabilitate it. Moreover, since the Relocation Act applies to all federal agencies—and also to state and local agencies acting with federal financial assistance—resolution of the issues presented here is important to all federal agencies—and many state and local ones—that own property on which tenants reside.

2. On the merits, the interpretation of the Relocation Act by the court below was erroneous. The court gave an unduly broad interpretation both to the written order clause and to the phrase “‘for a program or project undertaken by a Federal agency.’”

a. While the court based its interpretation on what it considered the “plain terms” of the written order clause (App. A, *infra*, pp. 10A, 11A), we do not find the matter so clear. The written order clause speaks of a “written order of the acquiring agency.” The court read “acquiring agency” to include an agency that has acquired the property in question at any time in the past (App. A, *infra*, p. 9A), but it is at least equally plausible from the face of the statute

that the phrase denotes an agency that is engaged in or proposing to engage in an acquisition. If Congress had indeed meant "the written order of the agency that has acquired the property," it could well have said just that.

The apparent ambiguity is resolved by examination of the legislative history. The legislative history discloses that the written order clause was intended to provide a minor supplement to the coverage of the acquisition clause, not to expand the scope of the statute beyond the context of acquisitions of property for affirmative programs or projects.

The initial version of the written order clause appeared in the Senate bill, where a "displaced person" was defined as a person forced to move from property "as a result of the acquisition *or reasonable expectation of acquisition* of [the] property * * * by a Federal or State agency" (emphasis added). S. 1 91st Cong. 1st Sess. 105(1)-(5) (1969) 115 Cong. Rec. 31372 (1969). In the House Public Works Committee, the language was changed to the form ultimately enacted, which requires that the tenant actually be ordered to move by "the acquiring agency" instead of being eligible for benefits simply on the basis of a reasonable expectation that an acquisition would occur. See S. 1 91st Cong., 2d Sess. 1(6) (1970), 116 Cong. Rec. 40163 (1970). As the House Report noted: "If a person moves as a result of such notice to vacate, it makes no difference whether or not the real property actually is acquired." H.R. Rep. No. 1656, 91st Cong., 2d Sess. 4 (1970).

When the bill returned to the Senate, the only reference to the change in the definition of "displaced person" appeared in a memorandum on "points of significant concern" submitted by Senator Percy on behalf of the Administration. 116 Cong. Rec. 42139 (1970). The memorandum read, in relevant part:

Definition of displaced person. The House bill would limit the status of displaced person to those who move as the result of the acquisition of, or written notice to vacate, real property. The Senate version would provide a broader definition which includes those who move as the result of acquisition or reasonable expectation of acquisition.

Consistently with the House Report, this memorandum reflected the understanding that the House bill narrowed the scope of the Senate language. The House version prevailed over the Senate's "broader definition," and the language put forward by the House became the written order clause in Section 101(6) of the Act.

Thus it would appear, as Judge Wilkey concluded in his dissenting opinion below, that the change by the House "limited the definition, and certainly did not vastly expand it by covering all persons displaced with notice from property already owned and acquired by the agency" (App. A, *infra*, p. 41A (emphasis omitted)). As Judge Wilkey also concluded, the House and Senate versions of the written order clause "shared the same purpose," which was "to cover those given notice who moved prior to acquisition or

who moved even though the anticipated acquisition did not occur" (*ibid.* (emphasis omitted)).

Accordingly, the written order clause cannot properly be construed to bring within the coverage of the Relocation Act all tenants who are ordered to vacate premises owned by a federal agency. The written order clause supplements the acquisition clause by dispensing with the need for an actual acquisition so long as there is a written order to vacate. Like the acquisition clause, it is concerned with, and limited to, tenants who are required to vacate property in connection with the acquisition or anticipated acquisition of that property.

b. The court of appeals gave a similarly broad construction to the phrase "'for a program or project undertaken by a Federal agency.'" In the court's view, "the Sky Tower tenants were ordered to vacate their apartments 'for a program or project undertaken by a Federal agency'" because "the demolition of the buildings" was itself such a program or project (App. A, *infra*, p. 10A). At least this is true, the court added, where the demolition is "part of a program to 'eliminate blight'" and revitalize the area (App. A, *infra*, p. 11A and n. 27).

As Judge Wilkey noted in his dissent (App. A, *infra*, pp. 28A-32A), this argument misses the point. To meet the requirements of Section 101(6) of the Relocation Act, it is the *acquisition* of the property that must be for a federal "program or project." Even if the demolition were considered such a program or

project,⁵ or even if the demolition anticipates a further program or project, that is not sufficient to trigger the statute unless the agency's acquisition of the property—not simply its order to vacate—was made for that purpose.

This conclusion is indicated by the language of Section 101(6). The court of appeals construed the phrase "'for a program or project undertaken by a Federal agency'" as referring both to the word "acquisition" and to the term "written order." The phrase is more naturally read, however, as referring back singly to the "acquisition," which appears expressly in the acquisition clause and implicitly through "acquiring agency" in the written order clause. The written order clause functions as an appositive to the acquisition clause, not as an independent and separate concept.

The purpose and the legislative history of the Act support this construction. The legislative materials indicate that Congress intended the Relocation Act to provide benefits only to those who were forced to move because of an acquisition of property—or an anticipated acquisition—undertaken to make possible a federal project such as the construction or rehabilitation connected with a public works or urban renewal program. The House Report on the Act, H.R. Rep. No. 1656, *supra*, at 2, stated:

The need for [relocation benefits] arises from the increasing impact of Federal and federally assisted programs as such programs have evolved to meet the needs of a growing and

⁵ In accordance with the holdings in *Alexander* and *Caramico*, we submit that it is not.

increasingly urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little taking of residential or commercial property for farm-to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project—be it a highway, urban renewal project, or hospital—inevitably involves the acquisition and clearance of sites which now provide residential, commercial or other services.^[6]

Congress thus intended the Relocation Act to alleviate some of the harshness of the displacements required by the acquisition of property for federal projects, in part by providing compensation for interests not compensable under the law of eminent domain. See H.R. Rep. No. 1656, *supra*, at 1, 2. Con-

⁶ The context of the Relocation Act also indicates that the Act was intended to apply to acquisitions for federal programs or projects, not to involuntary acquisitions of defaulted properties. Title III of the Relocation Act, 42 U.S.C. 4651-4655, sets out policies governing "real property acquisition" under the Act. The only methods of acquisition considered in that Title are negotiation and condemnation.

gress also intended to compel the agency considering the projects to include the payments required by the Act among the costs of the project, to be weighed against its benefits and paid out of the project proceeds. Congress did not intend to escalate the cost of governmental actions consequent upon financial default, nor did it intend to handicap a public agency seeking to minimize its losses in these circumstances. As the Second Circuit pointed out in *Caramico* (509 F. 2d at 698-699), "the Act contemplates normal government acquisitions, which are the result of conscious decisions to build a highway here or a housing project or hospital there. * * *" The Act thus has no application where the order to move is not made in connection with an acquisition of property for a federal program or project.

3. The interpretation adopted by the court of appeals would invite anomalous results. The agency acquiring the property after a default could avoid any obligation to pay relocation benefits by insisting that the mortgagee deliver the property unoccupied, as was done in the *Caramico* case (see 509 F. 2d at 696). Inducing agencies to take this step in order to avoid the obligations of the Relocation Act would serve no discernible policy interest and might well result in greater hardship to the affected tenants.⁷

⁷ Also, the basis on which the court of appeals attempted to distinguish the *Alexander* case, see note 4, *supra*, would invite the agency to order the tenants to vacate at the earliest possible time after acquiring the property, before the agency had settled on any particular plan for disposing of the property after demolition.

In addition, the reading given the statute by the court of appeals could have the curious result of forcing the Department of Housing and Urban Development to make replacement housing payments (totaling as much as \$15,000) to homeowners who default on their own federally insured mortgages. 42 U.S.C. 4632. The Department could also be faced with claims for statutory relocation benefits by absentee landlords who default on mortgage payments and whose "business" is "displaced" as a result of foreclosure. 42 U.S.C. 4622.

To be sure, courts faced with such claims might find ways to avoid extending the decision in this case to those situations. These examples and others that might be posed illustrate, however, the uncabined reach of the decision below and the inconsistency of that decision with the intended scope of the Relocation Act.

4. The Department of Housing and Urban Development is not insensitive to the hardships that often accompany being forced to move from a federally owned housing development. The Department is now examining measures to provide some level of benefits to persons who are required to move from a Department-owned project but who do not qualify for benefits under the Department's interpretation of the Relocation Act. The level of assistance contemplated would be designed to enable each individual to find a decent,

safe, sanitary, and affordable unit in which to relocate, as well as providing reimbursement for reasonable moving expenses. It would not, however, include the substantial money payments required by the Relocation Act.

The Department is currently considering whether it can provide such assistance by regulation under existing program statutes or whether it must seek new legislation and authorization for funding. The Department is also considering the appropriate eligibility criteria and levels of assistance.

Because of the uncertainty generated by the conflict among the circuits, and because the decision below has a substantial financial impact on the Department of Housing and Urban Development (and other federal, state, and local agencies) and deprives the Department of the flexibility it needs to devise a new program of appropriate relocation benefits for qualifying tenants, reviewed by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

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APRIL 1978.

APPENDIX A

United States Court of Appeals for the
District of Columbia Circuit

(No. 75-2268)

SADIE E. COLE, ET AL.

v.

PATRICIA ROBERTS HARRIS, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS SECRETARY OF THE UNITED
STATES DEPARTMENT OF HOUSING AND URBAN DEVELOP-
OPMENT, ET AL., APPELLANTS

(No. 75-2269)

SADIE E. COLE, ET AL., APPELLANTS

v.

PATRICIA ROBERTS HARRIS, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS SECRETARY OF THE UNITED
STATES DEPARTMENT OF HOUSING AND URBAN DEVELOP-
OPMENT, ET AL.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil 74-1872)

Argued January 11, 1977; Decided November 14, 1977

Charles E. Biblowit, Attorney, Department of
Justice with whom *Peter R. Taft*, Assistant Attorney
General, *Earl J. Silbert*, United States Attorney,

Nathan Dodell, Assistant United States Attorney and *Jacques B. Gelin*, Attorney, Department of Justice were on the brief for appellants in No. 75-2268 and appellees in No. 75-2269. *Robert N. Ford*, *John A. Terry* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys also entered appearances for appellants in No. 75-2268 and appellees in No. 75-2269.

Florence Wagman Roisman, with whom *Lynn Edward Cunningham* was on the brief, for appellants in No. 75-2269 and appellees in No. 75-2268. *Ann K. Macrory* also entered an appearance for appellants in No. 75-2269 and appellees in No. 75-2268.

Before: **BAZELON**, *Chief Judge* **McGOWAN**, and **WILKEY**, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge BAZELON*.

Dissenting opinion filed by *Circuit Judge WILKEY*.

BAZELON, *Chief Judge*: The central issue on appeal is whether appellees, former tenants of the Sky Tower apartments in Southeast Washington, D.C., qualify for relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.¹ A subsidiary issue is whether, if they qualify, they should receive the full benefits of the Act or only some prorated portion of them. We hold that they qualify for full benefits under the statute.

I. STATEMENT OF THE CASE

Sky Tower was built in the 1950s under a program which provided Federal Housing Administration (FHA) insurance for veterans. It consisted of 19 buildings of garden-type apartments containing 217

¹ 42 U.S.C. § 4601 *et seq.* (1970) (hereinafter referred to as the Uniform Relocation Act).

one- and two-bedroom units. In 1970, a non-profit corporation purchased Sky Tower and secured a mortgage insured by the Department of Housing and Urban Development (HUD) under Section 236 of the National Housing Act.² The corporation undertook to rehabilitate Sky Tower and transform it into a 150-unit complex of larger apartments to serve low and moderate income families. HUD subsidized the interest rate on the mortgage³ and undertook to pay rent supplements for up to 60 households. In addition, 20 units were to be leased to the National Capital Housing Authority which would re-lease them at public housing rents to eligible households.⁴

By November, 1972, the original and a second general contractor had both defaulted in their performance of the rehabilitation work. The mortgagor then foreclosed on the mortgage and conveyed title to the project to HUD in exchange for mortgage insurance benefits as authorized by statute.⁵ At that time, 8 buildings had been completely rehabilitated, 3 were approximately half rehabilitated, and work had not yet begun on 8 others.

HUD took title to Sky Tower on June 15, 1973, and hired a management firm to operate the project. New month-to-month leases were executed with the tenants under the same terms as formerly. But by September, 1974 the agency had concluded that further rehabilitation was futile; it decided to demolish Sky Tower and sell the vacant land to developers for the construction of single family homes for middle-income families. On September 27, 1974, HUD's property manager sent no-

² 12 U.S.C. § 1715z-1 (1970).

³ Pursuant to § 236, 12 U.S.C. § 1715z-1 (1970).

⁴ Pursuant to 42 U.S.C. § 1401 *et seq.* (1970).

⁵ 12 U.S.C. §§ 1713(g) and (k) (1970).

tices to the 72 families then residing at Sky Tower informing them of HUD's decision and giving them 30 days notice to vacate the premises.⁶ Nine of Sky Tower's 19 buildings were demolished in December, 1974, and January, 1975. Departing tenants who were not in arrears in their rent were given \$300 for moving expenses and exempted from paying their last month's rent. HUD also claims to have assisted them in finding suitable new homes, but that is vigorously disputed by the tenants.⁷

On December 23, 1974, appellees brought suit on behalf of the tenants who had left Sky Towers pursuant to the eviction notices and the few tenants who remained there. They challenged HUD's decision to raze rather than rehabilitate the complex on several grounds and they sought declaratory and injunctive relief, as well as damages. One of their claims was that HUD had failed to comply with the Uniform Relocation Act.

On January 28, 1975, the District Court issued a temporary restraining order against any further demolition. On February 7, the TRO was expanded into a preliminary injunction. Severely castigating HUD for reaching an irrational decision and failing "to weigh the human values it was created by Congress to protect,"⁸ the trial judge enjoined any further demolition or evictions and ordered HUD to (1) clean up the rubble around the site; (2) restore the undemolished buildings to a condition at least as decent, safe, and sanitary as that existing as of September 17, 1974; (3) permit all former tenants who had left Sky Tower subsequent to September 17, 1974, to return to

⁶ The deadline was later extended to January 31, 1975.

⁷ See, e.g., JA 19, 21, 24, 26, 27, 32, 34, 37, 40, 64.

⁸ Cole v. Lynn, 389 F. Supp. 99, 105 (D.D.C. 1975).

the restored buildings at HUD's expense; and (4) provide security services adequate to prevent vandalism.⁹ The trial judge noted that these affirmative directives were necessary because "[o]nly by filling the buildings with qualified needy tenants can the project remain viable pending final determination;" otherwise "vandalism, empty apartments and continuing unsafe conditions would, as a practical matter, effectively accomplish demolition by a process of erosion."¹⁰

HUD appealed from the portions of the preliminary injunction requiring it to restore the buildings and arrange for the return of the tenants. But both the District Court and this Court refused to stay the order pending appeal, and, after HUD had complied with its terms, the appeal was dismissed as moot.¹¹

But compliance was slow in coming. The trial judge repeatedly noted HUD's "continuing defiance" of the order and took numerous steps to compel obedience, including finally an order to show cause why the government should not be held in contempt.¹² Six months passed before any tenant was returned to Sky Tower.

As of February, 1975, 17 households were still living at Sky Tower and 55 households had moved out. Most of those who had been displaced had relocated in units that were more expensive, smaller, or otherwise less desirable than the units they had left at Sky Tower. When HUD determined to evict the tenants from Sky Tower, it thrust them into a housing market that could not accommodate them. Instead, it was the acute shortage of housing in the District of Co-

⁹ *Id.* at 106.

¹⁰ *Id.* at 105.

¹¹ *Cole v. Lynn*, No. 75-1543 (D.C. Cir., dismissed Sept. 29, 1975).

¹² JA 79. *See also Cole v. Hills*, 396 F. Supp. 1235 (D.D.C. 1975).

lumbia for low-income persons with large families—the very class Sky Tower served—that made the decision to demolish so shocking to the trial judge.

The record shows that tenants experienced considerable difficulty in securing replacement housing.¹³ One tenant's rent increased from \$84 to \$189.50—out of a total income of \$243 per month for herself and two children. Another had to spend \$185 for rent out of a total monthly income of \$207—compared to \$98 for rent at Sky Tower.¹⁴

The practical effect of the preliminary injunction on these tenants was notification in July, 1975, that they could return to Sky Tower. HUD would pay their moving expenses and any expenses incurred in breaking their new leases. But the letter also stated:

The future of Sky Tower Apartments is not yet known. As a result of the Court case, HUD is taking a new look at the question of demolition of Sky Tower. If HUD should still decide to demolish, that decision would be reviewed by the Court. While it is possible that Sky Tower will ultimately be demolished, it is also possible that it will not. In the meantime, the Court's order requiring HUD to rehabilitate the units and move tenants back into the restored units will remain in effect.¹⁵

Faced with this uncertainty and the very real possibility of being uprooted yet again, only 18 families decided to return to Sky Tower.

On September 12, 1975, the District Court granted partial summary judgment for the tenants, holding that the tenants who had vacated Sky Tower were

¹³ See note 7 *supra*.

¹⁴ JA 64 and 29.

¹⁵ Joint letter sent to all former tenants of Sky Tower, July 16, 1975

entitled to benefits under the Uniform Relocation Act. Specifically, the court entered a declaratory order that any person who was a tenant of Sky Tower on September 27, 1974, and who had vacated his or her apartment as a result of HUD's notice, was entitled to a prorated portion of the benefits provided under Section 204 of the Act¹⁶ for the period between the date that tenant left Sky Tower and the date the tenants were permitted to return pursuant to the court's preliminary injunction (*i.e.*, August 1, 1975). The government took this appeal from the holding that the Uniform Relocation Act applies. The tenants cross-appeal from the termination of benefits on August 1.¹⁷

II. APPLICABILITY OF THE UNIFORM RELOCATION ACT

The Uniform Relocation Act was passed in 1970 to establish a uniform policy for the fair and equitable treatment of all persons displaced as a result of any federal or federally assisted program.¹⁸ It replaced a patchwork of piecemeal relocation statutes. For displaced tenants, it provides the following benefits: (1) actual reasonable moving expenses, or a moving expense allowance of up to \$300 and a dislocation allowance of \$200,¹⁹ and (2) a payment of the amount

¹⁶ 42 U.S.C. § 4624 (1970).

¹⁷ Subsequently, the District Court, with the consent of the parties, remanded the question of the disposition of Sky Tower to HUD for reconsideration in light of the concerns expressed in the court's opinion on the preliminary injunction. On December 17, 1976, HUD reported to the court that it had decided not to demolish the buildings but rather to transfer them to the District of Columbia, with HUD continuing to contribute substantial rent subsidies.

¹⁸ 42 U.S.C. § 4621 (1970).

¹⁹ 42 U.S.C. § 4622(a)(1) and 4622(b) (1970).

necessary to rent a comparable decent, safe, and sanitary dwelling for up to four years, but not to exceed \$4,000.²⁰ Most importantly, the Act provides that:

No person shall be required to move from his dwelling on or after January 2, 1971, on account of any Federal project, unless the Federal agency head is satisfied that replacement housing, in accordance with section 4625 (e)(3) of this title, is available to such person.²¹

Section 4625(e)(3) specifies that such replacement housing must be "in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, * * * and reasonably accessible to their places of employment. * * *"

To qualify for benefits under the Act, a tenant must come within the statutory definition of "displaced person." Reduced to its essential language, that definition reads:

The term "displaced person" means any person who * * * moves from real property * * * as a result of the acquisition of such real property, * * * or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency * * *.²²

²⁰ 42 U.S.C. § 4624(1) (1970). The payment is equal to the difference between the displaced person's former rent and the rent for a comparable replacement dwelling. 24 C.F.R. § 42.95(c) (1977). The Act also offers, as an alternative not relevant here, up to \$4000 towards a downpayment on the purchase of a dwelling. 42 U.S.C. § 4624(2) (1970).

²¹ 42 U.S.C. § 4626(b) (1970).

²² 42 U.S.C. § 4601(6) (1970). Section 4601(6) reads in full: "The term 'displaced person' means any person who, on or after January 2, 1971, moves from real property, or moves his personal

The section sets out two alternative grounds of eligibility: having moved as a result of the acquisition of property for a federal program or project (the acquisition clause); *or* having moved as a result of a written order of the acquiring agency to vacate the property for a federal program or project (the notice clause). The District Court ruled that appellees clearly fell within the second or notice definition:

[B]y having come into possession of the Sky Tower Apartment project as the result of a mortgage default, HUD was "the acquiring agency" within the meaning of the Act;

* * * the notices of September 27, 1974 advising Sky Tower tenants to vacate were the "written order of the acquiring agency to vacate real property" within the meaning of the Act; and

* * * the notices aforesaid were "for a program or project undertaken by a federal agency" within the meaning of the Act, to wit, the demolition of Sky Tower. * * *²³

We agree that appellees qualify as "displaced persons" under the notice alternative. It is undisputed that HUD is an "agency," and that HUD "acquired" Sky Tower within the common meaning of that word. It is undisputed that HUD, having acquired Sky Tower, served upon each tenant a written order to

property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622 (a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project."

²³ JA 89.

vacate.²⁴ And it is undisputed that some 55 households moved from Sky Tower "as the result of" HUD's written order.

Moreover, it is clear that the Sky Tower tenants were ordered to vacate their apartments "for a program or project undertaken by a Federal agency," namely, the demolition of the buildings. Although there is some suggestion in the government's brief that a "program or project" means only "a federal construction or rehabilitation project, such as public works or urban renewal,"²⁵ there is no warrant in the statute for this limiting interpretation. Obviously, construction and rehabilitation projects will frequently be preceded by demolition. If the government means that demolition is a "project" within the Act when the agency constructs a building in its place but not when the agency simply tears down without building up, the anomaly is obvious. HUD's mandate is to increase the stock of decent, sanitary housing for low-income families—not to destroy existing housing. Congress clearly did not intend that tenants displaced by a simple decision to wreck their homes would receive less protection than tenants displaced by a constructive urban renewal project.

In sum, appellees qualify as "displaced persons" within the plain terms of the notice clause. This common sense interpretation is reinforced by consideration of the policies of the Relocation Act. A basic purpose of the Act is to ensure that displaced persons do not "suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."²⁶ Equally important, by providing reloca-

²⁴ Letter sent to all tenants of Sky Tower, Sept. 27, 1974.

²⁵ Government brief at 15.

²⁶ 42 U.S.C. § 4621 (1970).

tion benefits for persons displaced by programs or projects for the general welfare, the Act ensures that federal officials take the costs of relocation into account *before* embarking on such programs.

Clearly, the Sky Tower tenants were displaced for a federal project "designed for the benefit of the public as a whole." In proceedings before the district court, HUD admitted that the demolition of Sky Tower was part of a program to "eliminate blight." It stated that Sky Tower had become "blighted, vandalized, unattractive and unsafe" and that the area needed to be "revitalized" by the construction of single-family dwellings in accordance with the District of Columbia government's master plan.²⁷ Thus, unless relocation benefits are paid to the former Sky Tower residents, they will be forced to bear a disproportionate share of the costs of a project for the benefit of the general public, and federal officials will be able to ignore relocation costs in considering whether to proceed with the project.

Although the Sky Tower tenants appear to qualify for benefits under the plain terms of the notice definition, the government nevertheless maintains that this definition is subject to a restriction not apparent from

²⁷ Government memorandum, quoted 396 F. Supp. at 1236. This purpose distinguishes the instant case from *Alexander v. U.S. Dept. of Housing and Urban Development*, 555 F. 2d 166 (7th Cir. 1977). There the decision to terminate, but not demolish, a housing project was held not to be a federal program or project. HUD had made no plans for the future of the buildings. The court said, "We fail to see how a decision to terminate a project can itself become a project in the absence of some indication that the decision to terminate and the order to vacate constitute a prelude to some governmental undertaking amounting to a program designed for the benefit of the public as a whole." *Id.* at 170. (emphasis added)

the face of the statute. Specifically, it contends that the tenants do not qualify as "displaced persons" because, at the time Sky Tower was *acquired*, HUD had not determined to use it for a federal program or project. We find the arguments advanced in support of this implied restriction unpersuasive.

First, the government argues that this restriction is required by *Caramico v. Secretary of Dept. of Housing and Urban Development*, 509 F. 2d 694 (2d Cir. 1974), which held that "random and involuntary" acquisitions of property due to default and foreclosure are not *acquisitions* for a federal program or project.²⁸ As the government concedes, *Caramico* was concerned solely with the acquisition definition, rather than the one upon which the Sky Tower tenants rely, the notice definition.²⁹ But it finds significance in the phrase "acquiring agency" contained in the notice definition. Invoking the principle that the same word used in different parts of a statute is presumed to have the same meaning each time it is used,³⁰ it argues that "acquiring agency" should be interpreted to mean an agency making an "acquisition" as that term was

²⁸ Because we conclude that appellees qualify as "displaced persons" under the notice clause, we need not reach the difficult question whether they also qualify under the acquisition clause. Thus, although we agree with *Caramico* that the acquisition clause requires an acquisition for a federal program or project, 509 F. 2d at 697, we express no opinion as to whether HUD's acquisition of Sky Tower, or any similar acquisition, can be so described.

²⁹ *Harris v. Lynn*, 411 F. Supp. 692 (E.D. Mo. 1976), *aff'd*, 555 F. 2d 1357, 1359 (8th Cir. 1977), relied upon by the dissent, also appears only to construe the acquisition clause of the Relocation Act. To the extent that that case can be interpreted as requiring an acquisition for a federal program or project under the *notice clause*, we disagree.

³⁰ Citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

construed by *Caramico*. In other words, that the notice definition, like the acquisition definition, should not apply where property is *acquired* due to default and foreclosure and only later is committed to use in a federal program or project.

We find little merit in this argument. Aside from the fact that "acquiring agency" is *not* the same word as "acquisition"—the former is an entity whereas the latter is an event—the government's argument proves too much. If an "acquisition" as that term is used in the acquisition clause is also required under the notice clause, then the notice alternative would be rendered surplusage.

More fundamentally, the government's argument fails to probe beyond the holding of *Caramico* to the rationale of that decision. Because the Relocation Act "contemplates a conscious government decision to dislocate some so that an entire area may benefit," 509 F. 2d 698, *Caramico* requires that an "acquisition" for purposes of the acquisition clause must be *for* a federal program or project. By parity of reasoning, the Act requires that an "order to vacate" in terms of the notice clause must be *for* a federal program or project, a requirement satisfied in this case. The government's argument that the notice clause requires, *in addition*, that an agency *acquire* property for a government program or project, would artificially restrict the coverage of the Act in a way inconsistent with the policies recognized by *Caramico*.

The government's second argument, vigorously pursued by the dissent, is that the legislative history of the Relocation Act indicates the notice definition was intended to apply when an agency issues an order to vacate *before* real property is acquired. Of course, resort may be had to legislative history when a statute is ambiguous, or where the ordinary meaning would

lead to absurd or futile results.³¹ But "the plainer the language, the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F. 2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973). Since the notice clause is clear on its face, and its common sense meaning is consonant with the purposes of the Act, we would accept the government's interpretation of the clause only if supported by clear and convincing evidence from the legislative history.

In fact, there is very little legislative history expressly concerned with the meaning of the notice clause, and the history that exists is, at best, inconclusive.³² The meager state of the legislative history

³¹See, e.g., *United States v. Public Utilities Comm.*, 345 U.S. 295, 315 (1953); *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929).

³² The dissent emphasizes the fact that the original Senate bill defined a "displaced person" as one who moves "as a result of the acquisition or reasonable expectation of acquisition." 115 Cong. Rec. 31372 (1969). The dissent concludes that in adopting the House bill, which deleted the reference to "reasonable expectation of acquisition," and added the notice clause, Congress intended only "to provide a more concrete standard than 'reasonable expectation' of acquisition." Dis. op. at 21. However, there is little evidence in the legislative history that sheds light on Congress' intent in enacting the House version, and what evidence exists is ambiguous.

The House Report contains only one sentence directly applicable to the notice clause. This says: "If a person moves as the result of such notice to vacate, it makes no difference whether or not the real property actually is acquired." H.R. Rep. No. 1656, 91st Cong., 2d Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 5850, 5853. This implies that *one* circumstance in which the notice clause applies is when an agency orders someone to vacate property before the agency acquires it. But the Report does not say that this is the *only* situation in which the notice clause applies. In fact, the conditional language of the quoted sentence implies just the opposite.

suggests that in considering the definition of "displaced person" Congress' attention was focused on the class of persons displaced by acquisitions or anticip-

The dissent also relies on a statement in an executive branch memorandum stating that the Senate version was "broader" than the House version. Dis. op. at 20, quoting 116 Cong. Rec. 42139 (1970). This too is inconclusive. The "reasonable expectation of acquisition" language in the Senate bill would indeed cover some situations not covered by the notice definition, i.e. where the government has not acquired property and has not sent notice but there is a reasonable expectation of acquisition. But it does not necessarily follow that Congress, as opposed to the executive, intended the notice definition to be narrower than the Senate definition *in all respects*.

We are equally unpersuaded by the dissent's citation to other sections of the Relocation Act referring to persons displaced because of "acquisitions." Dis. op. at 22. This shorthand cross-reference is obviously more convenient than repeating the entire definition. The explanation for the particular choice of words most consistent with the purpose of the Act is that Congress assumed displacements would occur more frequently from acquisitions than from notices to vacate government property.

Similarly misguided is the dissent's reliance on § 217 of the Act, 42 U.S.C. § 4637 (1970). The dissent concludes that there would have been no need to enact § 217 if Congress had intended the notice clause to have its common sense meaning, since persons displaced under the programs referred to in this section "would undoubtedly have been given notices to vacate 'for' these projects and would have been qualified under the notice clause. * * *" Dis. op. at 27. The basis for this assertion is not apparent. In fact, written notice is not required by either program referred to in § 217. See 42 U.S.C. § 1455(c)(1) (1970) (title I of the Housing Act of 1949); 42 U.S.C. 3307 (1970) (title I of the Demonstration Cities and Metropolitan Development Act of 1966). Congress could quite reasonably conclude that even under the notice definition it was uncertain that persons displaced by these programs would be eligible for benefits. The explanation for § 217 most congruent with the legislative purpose is that it was enacted "out of uncertainty, understandable caution, and a desire to avoid litigation." *National Petroleum Refiners Ass'n v. FTC*, 482 F. 2d 672, 696 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

pated acquisitions of property, rather than the class of persons already living on government property and displaced by a federal program or project. But congressional inattention does not constitute the kind of convincing demonstration of contrary legislative intent required to overcome the plain language of the statute. In fact, considering the purposes of the Relocation Act, we are convinced that if Congress had explicitly considered the problem of persons ordered to vacate government property for a program or project, it would have approved an interpretation of the Act making benefits available for such persons.

The government's final argument is that the plain terms of the Uniform Relocation Act cannot be heeded because to do so would impose a financial burden on HUD. The essential point, however, is that any financial burden results not from our construction of the Act but rather from HUD's own decision to displace people in order to demolish their homes. HUD appears to suggest that if the costs of relocation are too heavy for government funds, the displaced tenants should bear them. But the mandate of the Act is precisely contrary: if the costs are too much for HUD, then the demolition should not take place.³³

³³ "It is no longer proper to require the displaced person, rather than the displacing project, to bear the cost of relocation. If this cost becomes prohibitive and necessitates some re-thinking about a particular project, then so be it, just as if the cost of land or labor and materials were prohibitive." Abramowitz, *Uniform Relocation Act Defended*, 29 JOURNAL OF HOUSING 279, 281 (1972).

It should be noted that, in a situation like the instant one, where there is a shortage of suitable replacement housing, *see* 42 U.S.C. §§ 4626(b) and 4625(c)(3) (1970), the costs of relocation to be borne by HUD might include the expense of constructing replacement housing. Section 4626(a) provides: "If a federal project cannot proceed to actual construction because comparable replace-

III. AMOUNT OF BENEFITS AVAILABLE

The District Court ruled that all persons who were tenants of Sky Tower on September 27, 1974, and who vacated their apartments as a result of HUD's notice, were entitled to a prorated portion of the benefits provided under Section 204 of the Act³⁴ for the period between the date of their move and August 1, 1975 (or the date on which any such person actually returned to Sky Tower, if earlier than August 1, 1975). August 1 was selected as the cut-off date because by that date all former tenants had been given the opportunity to return to Sky Tower pursuant to the preliminary injunction. As we understand the District Court's order, the Act's moving expenses benefit and its requirement that replacement housing be available are *fully* applicable to appellees; however, under the order appellees are entitled to only a *prorated* portion of the Act's rent benefits. As noted *supra*,³⁵ under the terms of the Act these latter benefits may amount to a maximum of \$4000 over a four-year period. Under the District Court's formula, however, these benefits would be limited to approximately \$750 per tenant.

We believe the trial judge was correct to prorate the benefits to those tenants who actually returned to Sky Tower in the summer of 1975. Their return to their original homes made the provision of money

ment sale or rental housing is not available, and the head of the Federal agency determines that such housing cannot otherwise be made available he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project."

³⁴ 42 U.S.C. § 4624 (1970).

³⁵ See n. 19 *supra* and accompanying text.

towards rent for comparable *replacement* housing unnecessary. Indeed such payments could not have been reconciled with the statute.³⁶

We cannot agree, however, that benefits to those tenants who did not choose to return to Sky Towers should terminate on the date they were given leave to return. We can understand the trial judge's disappointment that only 18 of the 55 displaced families chose to return. He felt that the remainder had "walked away from what they brought suit for, and now they want money," not housing.³⁷ But while this reaction is understandable, it overlooks a critical fact—the court's issuance of a *preliminary injunction* did *not* grant to appellees the right to return to the quiet enjoyment of their homes; rather, it gave them only the limited right to return *pendente lite* to a half demolished and decimated community which might

³⁶ 42 U.S.C. § 4624 (1970).

³⁷ The following colloquy took place:

"The COURT. No, I am not talking about the returning tenants. I am talking about the majority of your class that doesn't want to come back—that is the group I am talking about. The great bulk of these people listed in the report don't want to have anything to do with Skytower. They walked away from what they brought suit for, and now they want money, and that is where we are at.

"Mrs. ROISMAN. Well—

"The COURT. And I want to know how that is going to be handled.

"Mrs. ROISMAN. Well, to be fair, Your Honor, I do want to say that it is not that they have walked away—

"The COURT. They certainly have. They certainly have, and it has been a great disappointment after the extraordinary effort the Court made on representations as to their need—they all walked away from it.

"Now I don't want to argue that, but they did." JA 99.

still have been demolished in the near future.³⁸ A decision to return would mean giving up new homes found only after arduous search, undergoing the disruption of a second move some nine months after the first, and assuming the very substantial risk of being uprooted yet again should the demolition decision be upheld.

The affidavits in the record amply demonstrate that the tenants were motivated by these concerns, not a desire to "walk away" from the lawsuit.³⁹ Faced with the uncertainty of the situation, it was not unreasonable for some of the families to decline to return. We hold that the offer to return *pendente lite* pursuant to the *preliminary injunction* did not cut off the rights of relocation payments of those tenants who did not return.⁴⁰

Accordingly the decision below is *affirmed in part and reversed in part.*

WILKEY, Circuit Judge, dissenting: To read the confident language of Chief Judge Bazelon's opinion one would never guess that three circuits, three districts, twelve federal judges—every federal judge considering the issue before this case—had ruled contrary to the result reached by my colleagues here. They say

³⁸ This message was made explicit in the letter, approved by counsel for both sides, sent to all former tenants pursuant to the preliminary injunction. *See text at note 14 supra.*

³⁹ JA 49, 72, 84.

⁴⁰ HUD's own Handbook on providing replacement housing states: "In no case shall referral be made to a unit from which it can reasonably be anticipated that the family or individual may subsequently be displaced." HUD Relocation Handbook 1371.1 Rev. at 2-15 (Feb., 1975). The offer to return to Sky Tower did not satisfy this requirement.

that "appellees qualify as 'displaced persons' within the plain terms of the notice clause" and that this "common sense interpretation is reinforced by consideration of the policies of the Relocation Act."¹ The Seventh Circuit in *Alexander v. HUD*² held squarely the reverse; *Alexander* involved the notice clause, not the acquisition clause, and cannot fairly be distinguished from our case here. The Eighth Circuit in *Harris v. Lynn*³ dealt with persons displaced from property already owned by the federal agency, our situation here, and held that the tenants were not "displaced persons" under the Act, even though they may have moved pursuant to a notice to vacate, because absence of a federal "acquisition" was the key. The Second Circuit in *Caramico v. HUD*⁴ likewise held contrary in both rationale and result to the decision of my colleagues here, who attempt to distinguish *Caramico* on the ground that it involved the acquisition clause, not the notice clause. That same distinction was argued in *Alexander* and rejected by the Seventh Circuit, which pointed out that the rationale of *Caramico* applies with equal validity whether the acquisition or the notice clause is involved.

¹ Maj. op. at 10. And cf.: "Of course, resort may be had to legislate history when a statute is ambiguous, or where the ordinary meaning would lead to absurd or futile results. But 'the plainer the language, the more convincing contrary legislative history must be.' * * * Since the notice clause is clear on its face, and its common sense meaning is consonant with the purposes of the Act, we would accept the government's interpretation of the clause only if supported by clear and convincing evidence from the legislative history." *Id.* at 14 (footnote and citation omitted).

² 555 F. 2d 166 (7th Cir. 1977), *rehearing denied*, 19 September 1977.

³ 555 F. 2d 1357 8th Cir. 1977), *affirming* 411 F. Supp. 692 (E.D. Mo. 1976).

⁴ 509 F. 2d 694 (2d Cir. 1974).

These persuasive precedents will be discussed in detail at the proper place later in this dissent. I mention them at the outset to make the reader of Judge Bazelon's well-written opinion aware that it rests, not on firm logic and precedent, but on no precedent and on a rationale which has been argued and universally repudiated elsewhere. Now to the facts of this case, and the proper application of the statute and the precedents thereto.

To be entitled to benefits as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act⁵ a person must be required to move as a *result of the acquisition of property for a program or project* undertaken by a federal agency or with federal financial assistance. Or, alternatively, a "displaced person" may be someone required to move as a *result of a written notice by the acquiring agency to vacate real property for a program or project* undertaken by a federal agency or with federal financial assistance. In this case, the Department of Housing and Urban Development (HUD) acquired title to the Sky Tower buildings due to the default and foreclosure of the mortgage it had insured. About fifteen months later, HUD delivered written orders to the tenants to vacate, so that Sky Tower could be demolished and the land sold to developers.

HUD's position is that the tenants at Sky Tower are not "displaced persons" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (the Uniform Relocation Act or the Act). Relying heavily upon the decisions of the Seventh Circuit in *Alexander v. HUD*,⁶ the Eighth

⁵ 42 U.S.C. § 4601(6) (1970).

⁶ Note 2 *supra*.

Circuit in *Harris v. Lynn*,⁷ and the Second Circuit in *Caramico v. HUD*,⁸ HUD argues that the definition of a "program or project undertaken by a Federal agency" must be limited to "consciously and voluntarily undertaken public works projects." HUD contends that in this case the acquisition due to a default and foreclosure of an insured mortgage was random and involuntary and, therefore, should not be covered by the Uniform Relocation Act. Also, the acquisition was not for any "program or project" which HUD had in mind.

Accepting neither the soundness of the *Caramico* definition of "program or project," accepted by the Seventh and Eighth Circuits, nor the HUD characterization of the acquisition here as involuntary, the majority holds that appellees here, the Sky Tower tenants, are "displaced persons." The majority tries to avoid taking issue directly with the holding of *Caramico*, however, and rests its decision upon the grounds adopted by the District Court, that the tenants were required to move by the HUD notices to vacate for a federal project, namely the demolition of Sky Tower. I cannot join in this conclusion. (As I shall explain in more detail later, the "notice" category of "displaced persons" was designed by Congress to include persons *who move prior to acquisition* upon receiving notice from the acquiring agency of its intention to acquire the property. Even if the agency does not acquire the property for some reason, these persons would be assured of benefits under the Uniform Relocation Act. The "notice" alternative was *not* meant to apply to a situation such as

⁷ Note 3 *supra*.

⁸ Note 4 *supra*.

this where HUD had already acquired Sky Tower and a year later gave notices to vacate.)

As will be seen in the analysis which follows, the critical inquiry must consider the first clause of the "displaced person" definition, namely, whether the initial "acquisition" of Sky Tower was for "a program or project undertaken by a Federal agency," as well as the second ("notice") clause of the definition, for both clauses contemplate a *voluntary* acquisition, and both an *actual* acquisition and a notice of a *proposed* acquisition must be "for a program or project" and anticipated resulting displacement. As will be seen below, the acquisition here, by default and foreclosure of an insured mortgage, should be considered involuntary. Further, as *Caramico* properly establishes, acquisitions by such involuntary and random means are not for a federal "program or project" within the meaning of the Uniform Relocation Act.

In short, falling into neither clause of the definition, appellees here are not "displaced persons." This result rests, I believe, upon a reading of the statutory definition which is faithful to Congressional intent, consistent with the text of the definition and the structure of the statute, and supported by case law. Whether this result, which disqualifies appellees from the benefits of the Uniform Relocation Act, is justified by reasons of policy or equity remains a question for Congress, and not for the courts, as is made clear in Part IV below.

I. INVOLUNTARY ACQUISITION—THE FACT HERE

As the majority explains in more detail,⁸ Sky Tower was purchased in 1970 by a nonprofit corporation by

⁸ Maj. op. at 3.

means of a mortgage insured by HUD. Following abandonments by the contractors and default by the nonprofit corporation, the mortgagee elected to foreclose on the mortgage and transfer title to HUD in return for the mortgage insurance benefits. In the language of *Caramico*,¹⁰ this acquisition was "involuntary and in response to the default." Such "random acquisitions * * * of defaulted property," *Caramico* continued, "are not acquisitions 'for a program or project undertaken by a Federal agency' within the contemplation of the drafters of the Relocation Act."

While the majority avoids responding to *Caramico* directly,¹¹ the question of whether HUD's act here was an acquisition "for a [federal] program or project," *i.e.*, a voluntary acquisition, must ultimately be faced under the notice clause discussed later. Hence it is helpful to look at what the District Court said relevant to this point:

Rehabilitation work began at Sky Tower in May of 1971. By November, 1972, two contractors had defaulted in their performance of the rehabilitation work. At that time, eight buildings had been completely rehabilitated, three were approximately 50 percent rehabilitated, and work had not yet begun on eight others. Although the non-profit sponsor wished to complete the rehabilitation work, and the mortgagee was prepared to allow that, HUD insisted that the property be foreclosed. *See* 24 C.F.R. § 236.56. Title was transferred to HUD on June 15, 1973.¹²

Note that the District Court only says that HUD "insisted" upon foreclosure. The obvious question is *why* HUD "insisted." Could it have been that HUD

¹⁰ 509 F. 2d at 699 (footnote omitted).

¹¹ *See* Maj. op. at 12 n. 28.

¹² *Cole v. Lynn*, 389 F. Supp. 99, 101 (D.D.C. 1975).

had no option but to insist upon foreclosure, thus making its action involuntary? The answer is yes, and the clue is the citation.

That citation provides the explanation for HUD's "insistence." 24 C.F.R. § 236.56, "Determination of project feasibility—fair market rentals," as set out in full below, establishes the rule in its paragraph (a) that **HUD shall not** make commitments for mortgage insurance for projects where the rents will exceed the rents for similar housing.¹³ Paragraph (b) of the rule, as noted below, sets out the two *necessary* conditions for any exceptions to the limit. With its bare citation to § 236.56, the District Court's opinion does not explain HUD's "insistence," but, as the rule

¹³ § 236.56 Determination of project feasibility—fair market rentals.

(a) In the determination of project feasibility prior to issuing a commitment for mortgage insurance under this part, the fair market rentals estimated in accordance with § 236.56(a)(2) shall be at a level that can be expected to attract nonsubsidized tenants, who will pay fair market rentals, and shall not exceed the rentals obtainable for reasonably comparable nonsubsidized rental dwelling units similarly located. Adjustments may be made in such rentals to reflect additional management services such as increased tenant screening, counseling, and income certification and recertifications.

(b) In determining the feasibility of a project to be located in a deteriorating residential neighborhood, the Commissioner may determine a project to be feasible with estimated fair market rental levels in excess of those than [sic] can be expected to attract nonsubsidized tenants in that neighborhood provided that:

(1) The estimated fair market rentals do not exceed estimated fair market rentals obtainable in comparable projects in more stable neighborhoods, and

(2) The proposed project can be expected to contribute to the stabilization or improvement of the neighborhood.

[37 F.R. 7157, Apr. 11, 1972]

itself suggests, it may well have been that HUD had no option but to insist.

Reference to the record, moreover, indicates that HUD's acquisition was indeed involuntary. An understanding of further background events, some of which were not described by the District Court, may be helpful in making a fair characterization. As noted by the District Court, rehabilitation work began in May of 1971. According to the Acting Director of the HUD-District of Columbia Area Office, whose affidavit in relevant part below describes the chronology of events,¹⁴ in March of 1972 the nonprofit sponsor asked

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AFFIDAVIT OF HARRY W. STALLER

Harry W. Staller, first being duly sworn, deposes and says:

1. This affidavit is submitted for purposes of explaining the circumstances under which HUD acquired title to the Sky Tower project and other facts relevant to the relocation of Sky Tower tenants. Although I did not become Acting Director of the HUD D.C. Area Office until July 1973 the statements contained herein are based upon reports from members of my staff and documents contained in the project files, as well as my personal knowledge.

2. The sponsor of the Sky Tower project, Anacostia No. One, Inc., experienced difficulty with the original general contractor and through the mortgagee for the project Walker and Dunlop, Inc., requested in March 1972 that HUD approve a substitution of contractors and an increase in the maximum amount of the mortgage from approximately \$2.9 million to \$3.2 million. An interim increase in the insured mortgage is an unusual action which increases HUD's liability. In fact, it is my understanding that an interim increase had never been granted in this office prior to that time. However, because of HUD's desire to have the project completed, the requests were approved by June 1972.

3. The second contractor abandoned work on the project in November 1972. HUD allowed the sponsor to attempt to finish the project by itself. However, in January 1973, the second contractor filed a law suit against the sponsor and mortgagee and, in addition, placed a lien on the property on February 22, 1973, in violation of the terms of the construction contract.

HUD to approve a substitution of contractors and to increase the insured mortgage from \$2.9 million to \$3.2 million. HUD agreed to this "unusual action" of increasing its liability. After the second contractor abandoned work on the project and placed a lien on the property, the nonprofit sponsor was thrown into default. At this point, in April of 1973 HUD was informed that the *mortgagee had elected to foreclose*, as it was permitted to do by HUD regulations. The sponsor then sought a *second* increase from HUD in

4. Since the owner was unable to bond off the mechanics lien, no further mortgage proceeds could be drawn to fund interest and construction costs. On March 1973, Walker and Dunlop, Inc., the mortgagee for the project, notified the Area Office of the default citing as a basis the fact that the contractor had quit the project, a lien had been placed on the project, and, interest due February 1 had not been paid. A copy of the notice of default is attached hereto, as Exhibit I and incorporated herein.

5. Under HUD Regulations, when a project is in default, the mortgagee has the option of either foreclosing the mortgage or assigning it to HUD. By letter dated April 4, 1973, Walker and Dunlop informed the Area Office that it had elected under the terms of the contract for mortgage insurance to foreclose on the property. A copy of this letter is attached hereto as Exhibit II and is incorporated herein.

6. In the following weeks the sponsor of the project requested another increase in the maximum amount of the insured mortgage. Because of the past history of the project and since this increase would require rents in excess of what tenants in the neighborhood could afford or would be willing to pay, HUD had no alternative but to reject this request.

7. By letter dated May 7, 1973, Walker and Dunlop notified the HUD Central Office of its intention to foreclose on the mortgage at the earliest possible date. A copy of this letter is attached hereto as Exhibit III and is incorporated herein.

8. HUD accepted title to and possession of the property on June 15, 1975, [sic] and subsequently paid Walker and Dunlop mortgage insurance benefits approximately in the amount of proceeds disbursed under the mortgage during construction.

the amount of the insured mortgage, which was presumably *the mortgagee's condition for allowing the sponsor to complete the work*. By HUD's account, however, "[b]ecause of the past history of the project and since this increase would require rents in excess of what tenants in the neighborhood could afford or would be willing to pay, HUD had no alternative but to reject this request."¹⁵ *HUD's inability to extend a second insurance increase was presumably based on 24 C.F.R. § 236.56*, which, as noted, directs that mortgage insurance shall not be committed where the rents would be in excess of rents for similar housing.¹⁶

In sum, then, it appears from the record—and is consistent with the opinion of the District Court—that HUD's taking of title to Sky Tower was an involuntary acquisition in response to a default. Whether such acquisitions are for a "program or project" within the meaning of the Uniform Relocation Act is the issue to which I now turn.

II. "PROGRAM OR PROJECT"—VOLUNTARY AND INVOLUNTARY ACQUISITION

In *Caramico v. HUD, supra*, residents of housing units in low income areas were evicted by mortgagees seeking to recover on their mortgage insurance fol-

¹⁵ *Id.* at paragraph 6.

¹⁶ See 24 C.F.R. § 236.56(a), quoted note 13 *supra*. Paragraph (b), as noted, sets out the two necessary conditions for any exception. Although the record is not conclusive on this point, it does not appear that HUD considered Sky Tower as a project suitable for exceptional treatment. By the reference in the affidavit to the project's "past history," HUD was taking note, doubtlessly, of the one increase already granted, the two abandonments by contractors, the lien placed on the property, and the original election of the mortgagee to foreclose.

lowing default. Under FHA regulations, recovery required that the mortgagee tender possession of the property unoccupied to FHA, although FHA could waive the requirement in particular cases. Although FHA had acquired the properties in *Caramico*, thus compelling the residents to move prior to the acquisition, the Second Circuit did not consider the acquisition as being "for a program or project undertaken by a Federal agency, or with Federal financial assistance." Drawing upon the legislative history as well as other provisions of the Uniform Relocation Act, *Caramico* read the "program" definition as "contemplat[ing] normal government acquisitions, which are the result of conscious decisions to build a highway here or a housing project or hospital there."¹⁷ Acquisitions due to defaults and foreclosures, being involuntary and random, were not judged by *Caramico* as being for "a program or project."

Relying on *Caramico*, HUD argues that this acquisition likewise, being involuntary, is not for a "program or project."

In formulating its definition, *Caramico* drew upon four separate provisions of the Uniform Relocation Act: 42 U.S.C. §§ 4621, 4626, 4625(a) and 4651(1) and (8).¹⁸ In addition, *Caramico* took account of the legislative history, quoting extensively from the House Report.

The *Caramico* definition is thus soundly based upon the various provisions of the statute and the intent of Congress. The examples in the House Report of typical acquisitions—for a highway or for a hospital—involve, as *Caramico* explained, conscious and planned government decisions to proceed with partici-

¹⁷ 509 F. 2d at 698.

¹⁸ *Ibid.*

ular projects. In making these decisions, the Government can and must calculate in the cost of relocation. But in accepting title after a foreclosure, the Government usually has no choice about acquisition. It cannot weigh costs against benefits, including the costs of relocation, before deciding to acquire. Congress must have been aware of this very fundamental and obvious difference; an open-ended program whose cost is incalculable is not simply to be presumed in a total absence of expressed Congressional intent.

The majority opinion argues that "the mandate of the Act is precisely contrary: if the costs are too much for HUD, then the demolition should not take place."¹⁹ This statement once again blithely ignores the issue that the majority would fain forget: that this "acquisition," and the subsequent action by HUD, was compelled, was *involuntary*, and thus was not for a "project or program" within the meaning of the Act. The undisputed facts here show that HUD was forced by the mortgagee to take over Sky Tower, was confronted with a situation under which the housing could not be rehabilitated and then rented at rates permissible under the regulations,²⁰ and hence, more than a year after the involuntary acquisition, was forced to go the route of demolition preparatory to building something economically viable. This case is a good illustration of why Congress did *not* in the statute, either under the "acquisition" or the "notice" clause, compel HUD to pay relocation benefits in such an involuntary—and financially incalculable—situation. The majority's verbal shrug of the shoulders—"if the costs are too much for HUD, then * * *"—is an attempted brushoff of some very weighty practical

¹⁹ Maj. op. at 16.

²⁰ See pp. 5-6 *supra*.

operating budget considerations to which Congress, if it had desired to do what the majority claims it did, would have been compelled to give serious and detailed attention.

My colleagues' position in interpreting the statute here is not only directly contrary to that of the Second Circuit in *Caramico* but is also in direct conflict with the Seventh Circuit in *Alexander v. HUD*.²¹ *Alexander* involves the now familiar story of an apartment project in default on the loan, continuing default, HUD foreclosure and taking over the property. The Riverhouse apartment complex was plagued by unsafe conditions, nonpayment of rent, and excessive cost of bringing the project into good condition—remarkably similar to Sky Tower here. HUD then did precisely what it did here, *i.e.*, caused notices to vacate to be served on all tenants. The plaintiff tenants sought relocation benefits, asserting that the notice to vacate made them eligible for benefits afforded to "displaced persons" within the meaning of the Act. The District Court granted summary judgment for the defendant HUD, holding that the Act was inapplicable to the closing of the Riverhouse project, and making the same analysis of the statute that the Second Circuit had made in *Caramico* and that I have urged here.

The Seventh Circuit unanimously affirmed, pointing out that "[e]ligibility for URA benefits is also based on the requirement that a person be displaced 'for a program or project undertaken by a federal agency, or with federal financial assistance.' 42 U.S.C. § 4601(6). This requirement has been interpreted to mean construction of new federal projects."²² The

²¹ 555 F. 2d 166 (7th Cir. 1977), *rehearing denied*, 19 September 1977.

²² *Id.* at 169 (citation omitted).

Seventh Circuit then discussed *Caramico* at some length, and emphasized the significance of the Second Circuit's "[f]inding a crucial difference between mortgage insurance acquisitions and acquisitions under programs covered by URA."²³ The difference, according to the Seventh Circuit, was that "the Second Circuit characterized the former as 'random and involuntary while normal urban renewal contemplates a conscious government decision to dislocate some so that an entire area may benefit.'"²⁴ The Seventh Circuit thus agreed completely with the Second Circuit in holding that involuntary mortgage foreclosure acquisitions were not within the "programs or projects" contemplated by the Act.

Other statutory provisions, cited by *Caramico*, also suggest that acquisition by involuntary foreclosure does not come within the Uniform Relocation Act. 42 U.S.C. § 4626(a), for example, provides authority for agency action "[i]f a Federal project cannot proceed to actual *construction*" (emphasis added). And 42 U.S.C. § 4651 on methods of acquisition establishes policies on appraisal, negotiation and eminent domain.

In sum, if this acquisition is understood as having been involuntary, and if the Second and Seventh Circuits' definition of "project" as excluding such involuntary acquisitions is accepted, then appellees are not "displaced persons" within the meaning of the "acquisitions" clause in the definition. For to the extent that appellees can be said to have moved from Sky Tower as a result of the HUD acquisition, that acquisition was not "for a program or project undertaken by a Federal agency" as contemplated by the Uniform Relocation Act.

²³ *Id.*

²⁴ *Id.*, quoting 509 F. 2d at 698.

III. THE NOTICE CLAUSE

The position of the majority is that whether or not appellees are "displaced persons" under the acquisitions clause they are "displaced persons" under the notice clause because they moved as a result of HUD's notice to vacate so that HUD could carry out its "project" of demolishing Sky Tower. The majority's reading of the notice clause, however, is not consistent with the purpose that Congress meant it to serve. Moreover, the majority opinion has misunderstood the argument HUD has advanced and is thus not even responding to the reading urged by HUD, which is indeed the correct interpretation.

Before beginning this analysis it may be helpful to set out the relevant text of the definition of "displaced person":²⁵

The term "displaced person" means any person who * * * moves from real property * * * as a result of the acquisition of such real property, * * * or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency * * *.

A

The majority says that HUD denies the applicability of the notice clause by not classifying demolition as a "project," quoting HUD's brief²⁶ that only "a federal construction or rehabilitation project, such as public works or urban renewal" constitutes a "project" in HUD's estimation.²⁷ The sentence the majority partially quotes, however, is *not* making the

²⁵ 42 U.S.C. § 4601(6) (1970).

²⁶ HUD Brief at 15.

²⁷ Maj. op. at 10.

argument attributed to it. The sentence quoted in full reads as follows:

The legislative history shows that Congress intended to provide benefits only to people who were forced to move because of acquisition consciously and voluntarily undertaken to further a federal construction or rehabilitation project, such as public works or urban renewal.

This full sentence is further quoted in context in the long excerpt from the HUD brief reproduced *infra*. The overall argument advanced by HUD is that the Act requires an *acquisition* for a project, such as public works, to satisfy the definition of "displaced persons." HUD doubtlessly concedes that if Sky Tower were voluntarily and consciously acquired, *e.g.*, by eminent domain, in order to demolish it and sell the vacant land, there would be acquisition for a "program or project."

A careful reading of HUD's brief shows that it never argued at all that a demolition, rather than a construction, is not a "project." Not only would this argument generally be rather simple-minded, because demolition usually precedes construction, but HUD would have to know that it would be inapplicable here, as Sky Tower was concededly being torn down to make way for the construction to single-family units. Rather than making this clearly flawed argument, the HUD Brief is advancing a reading of the notice clause based upon the purpose Congress intended for it.

To avoid the ambiguity of paraphrasing HUD, reproduced in the text below is the portion of the HUD Brief (pp. 13-15) which contains its argument on the meaning of the notice clause:

Apparently, the district court considered the involuntary nature of HUD's acquisition ir-

relevant where, as here, the person moves "as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency," even though it might be relevant where (as in *Caramico*) the tenants move "as a result of the acquisition of * * * real property * * * for a program or project undertaken by a Federal agency * * *." However, the Second Circuit made clear that in *Caramico* it was interpreting the phrase common to both clauses, "for a program or project undertaken by a Federal agency" rather than the term "acquisition" which appears only in one clause. Moreover, there is no basis for distinguishing between the nature of the acquisition in the two provisions. An "acquiring agency" in the "notice" clause should refer to the same type of acquisition as does the "acquisition" clause.¹⁰ [¹⁰ There is, of course, a presumption that the same word used in different parts of a single statute is intended to have the same meaning each time. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)]. The volitional nature of the acquisition is the same for both classes of displaced persons. And in both clauses there must be acquisition "for a program or project." At the time HUD acquired Sky Tower, no decision regarding disposition of the property had been made. Over a year elapsed before HUD decided to raze the buildings. Thus, the property was not acquired for any program or project. *The provision relied on by the district court (the notice provision) was enacted to assure that people who move prior to actual acquisition can receive benefits if they receive a notice from the acquiring agency of its intention to acquire the property* [emphasis added]. Therefore, benefits accrue to an individual before acquisition occurs and even in the event it never occurs. H. Rept. No. 1656, 91st Cong., 2d sess. 4 (1970). It was not intended to make

relocation benefits available for different types of acquisitions or for different classes of programs or projects than the "acquisition" clause.

The legislative history shows that Congress intended to provide benefits only to people who were forced to move because of *acquisition* consciously and voluntarily undertaken to further a federal construction or rehabilitation project, such as public works or urban renewal [emphasis added.]

As can be seen from this excerpt, HUD is contending that *even as to tenants who seek to qualify as "displaced persons" under the notice category*, it is dispositive whether the *acquisition* was *for a project or program*, that is, whether the acquisition was made as a voluntary and conscious choice. This view is textually based, as explained above, on a reading of "acquiring agency" in the notice clause as referring back to the first clause, that is, to an agency which is *acquiring* property *for* a voluntary and conscious "program or project." And the HUD view is further based, as shown by the citation to the House Report, upon the legislative intent that the notice clause should ensure coverage of those who move prior to acquisition and even in the event it never occurs.

The majority opinion is thus grossly in error when it claims " * * * the government's argument proves too much. If an 'acquisition' as that term is used in the acquisition clause is also required under the notice clause, then the notice alternative would be rendered surplusage."²⁸ The notice clause was put in to take care of persons displaced in advance of a *proposed acquisition which is never consummated*, as is shown in the text of this opinion, *infra*.

²⁸ Maj. op. at 13.

Likewise, the majority claim that “[t]he government’s argument that the notice clause requires, *in addition*, that an agency *acquire* property for a government program or project, would artificially restrict the coverage * * *”²⁹ This is not the government’s argument at all. The government does not say that for a person to be displaced under the notice clause the agency *must acquire* the property, only that the agency *propose to acquire* and give written notice to that effect. This is the whole purpose of the notice clause; it is the majority’s erroneous construction of the government’s argument which alone would create a “surplusage.”

B.

With the HUD position in this case now fairly set out, it appears that due to the serious clash of views, textually and otherwise, on the proper reading of the notice clause, an independent examination of the legislative history is now necessary to determine the purpose Congress meant the notice clause to serve.

The Uniform Relocation Act of 1970 originated in the Senate as S. 1. As reported out of the Committee on Government Operations and as passed by the Senate, S. 1 defined a “displaced person” as essentially any person moved from real property “as a *result of* the acquisition *or reasonable expectation of* acquisition of * * * real property, in whole or in part, by a Federal or State agency.”³⁰ This language was patterned apparently³¹ upon the definition of the 1968

²⁹ Maj. op. at 13 (emphasis in original).

³⁰ S. 1, 91st Cong., 1st Sess. § 105(1)–(5), *reprinted in* 115 Cong. Rec. 31372 (1969) (emphasis supplied). *See id.* § 110.

³¹ S. Rep. No. 488, 91st Cong., 1st Sess., 2 (1969). *See also* 115 Cong. Rec. 31535 (1969) (remarks of Sen. Cooper).

Highway Act³² which had also referred to a "displaced person" as someone moving "as a result of the acquisition or reasonable expectation of acquisition." S. 1, however, had dropped the reference of the Highway Act to "acquisition of such real property, which is *subsequently acquired*,"³³ thereby *broadening* the definition to cover persons who move due to a reasonable expectation of acquisition even though the property is not later acquired. An examination of the deleted phrase—"which is subsequently acquired"—shows the undeniable broadening effect of the deletion, for the deleted phrase was an important limitation.

When S. 1 was reported from the House Public Works Committee, however, the language of the definition had been changed to its present form, the result of recognition of the expansion accomplished by the deletion. A "displaced person" was someone who moved from real property "as a result of the acquisition of such real property * * * or as the result of the written order of the acquiring agency to vacate real property" for a federal or federally-funded "program or project."³⁴ After this change by the House Committee from the language about "reasonable expectation," the House Report, accompanying the revised S. 1, assumed particular importance in defining the meaning of the notice clause. After the House Report tracks the terms of the revised S. 1 in describing the definition of "displaced person," it immediately adds: "*If a person moves as a result of such a*

³² Pub. L. No. 90-495, 82 Stat. 834, § 511(3) (repealed 1971).

³³ *Ibid.* (emphasis added).

³⁴ S. 1, 91st Cong., 2d Sess. § 1(6), *reprinted* in 116 Cong. Rec. 40163 (1970) (emphasis added).

notice to vacate, it makes no difference whether or not the real property actually is acquired."³⁵ While this is the only sentence in the House Report explaining the meaning of the notice clause, its evolution and antecedents render this comment clear and unmistakable in meaning. The House Report continues:³⁶

It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project.

The Report then gives various examples, such as that it *is* acquisition for a Federal project if a state acquires property, even with only state money, for the right-of-way for a Federal-aid highway. There are *no examples* given of "displaced persons" where the move was made as a result of notice regarding property which was *already* in the ownership of the Federal agency.

Following approval by the House, the revised S. 1 was returned to the Senate, the House indicating a refusal to go to conference. There were other changes, particularly involving judicial review, that occupied the attention of the Senate in its renewed consideration. The only apparent reference to the change in definition was in a memorandum on "points of significant concern" submitted by Senator Percy on be-

³⁵ H.R. Rep. No. 1656, No. 91st Cong., 2nd Sess. 4, *reprinted in* [1970] U.S. Code Cong. & Ad. News 5850, 5852.

³⁶ *Id.* (emphasis added).

half of the Administration. The relevant paragraph provides as follows:²⁷

Definition of displaced person. The House bill would limit the status of displaced person to those who move as the result of the acquisition of, *or written notice to vacate*, real property. The Senate version would provide a broader definition which includes those who move as the result of acquisition *or reasonable expectation of acquisition*.

In the estimation of the Administration, then, the House language requiring notice was seen as narrowing the coverage from those who move as the result of "reasonable expectation of acquisition" to those who receive a written notice prior to such expected acquisition, although the memorandum makes no judgment about the desirability of this change. The Senate again passed S. 1 and the President signed it into law.

Looking back at the legislative history, the purpose which should be attributed to the notice clause seems clear. The original bill, S. 1, had provided a broad definition of "displaced persons," covering those who moved with a "reasonable expectation" that an agency would acquire their housing for a project even if the agency did not ultimately make the acquisition. This definition, however, appears to present obvious problems of administration, particularly as it may call for many individual determinations on "reasonableness" based on the facts of each case, with all determinations subject to judicial review.²⁸ The House

²⁷ 116 Cong. Rec. 42139 (1970) (emphasis supplied).

²⁸ See, e.g., *United States v. Braddy*, 320 F. Supp. 1239, 1241 (D. Ore. 1971), which held that by the phrase "reasonable expectations" in the 1968 Highway Act "Congress intended the proper state agency to weigh each case on its own merits."

change, to replace "reasonable expectation" with "written notice" from the "acquiring agency," appears to have been an effort to simplify and regularize the definition by limiting coverage to those with specific notice. The change would also have the effect of narrowing the definition since generally for most projects, like highway construction, there would be fewer people receiving written notice to vacate than would have a reasonable expectation that their residences might be acquired.

The House and Senate versions, though, shared *the same purpose*: as the House Report said, *this supplemental definition meant to cover those given notice who moved prior to acquisition or who moved even though the anticipated acquisition did not occur*. This appears to be the limited purpose envisioned for the notice clause. It was designed to provide a more concrete standard than "reasonable expectation" of acquisition. If anything, the change by the House limited the definition, and certainly did *not vastly expand it* by covering all persons displaced with notice from property *already owned and acquired* by the agency. In short, the "displaced persons" meant to be covered by the Uniform Relocation Act are those connected with the acquisitions or anticipated acquisitions by agencies for their programs.

It is thus dispositive here whether Sky Tower was acquired for a program or project, as discussed in Parts I and II above. This is the basic issue which separates my view from the views of my colleagues; whether the acquisition, or the notice clause is involved, the acquisition or notice of proposed acquisition must be an "acquisition for a program or project." There can be no such acquisition if HUD's accession to title is involuntary. Caramico, Alexander, and Harris, supra.

C.

The meaning of the notice clause found in the legislative history also draws support from other provisions of the Act as well as from the available case law. Title I of the Uniform Relocation Act contains the general provisions, including definitions; Title II sets out the actual relocation assistance to be provided. Section 202, for example, specifies the compensation for moving and related expenses; it begins:³⁹

Whenever the *acquisition* of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person * * *.

Section 205, concerning the advisory services for relocation assistance, also contains an identical introduction, about the "acquisition" of real property.⁴⁰ These occasional introductions are presumably meant as rough paraphrases of the coverage of the Act, being of significance here, therefore, for their focus on "acquisition" for a project as a condition for benefits. There is no suggestion that these clauses, found seemingly at random in two of the sections of Title II, mean that there should be different benefits available to "displaced persons" qualified by the acquisition clause than for those qualified by the notice clause, defined by majority in such a way as to be independent of the acquisitions requirement.

Title III of the Act, concerning uniform acquisition policy, also appears to lend some support to the HUD position. Section 301(5) directs all agencies to schedule construction projects in such a way that no

³⁹ U.S.C. § 4622(a) (1970) (emphasis added).

⁴⁰ *Id.* § 4625(a).

person occupying real property is required to move "without at least ninety days' *written notice* * * * of the date by which such move is required."⁴¹ This clear-cut directive, which agencies must meet "to the greatest extent practicable," ties in well with the "written notice" clause as an alternative definition. Once a person receives the written notice directed by section 301(5), he assuredly becomes a "displaced person" and can begin to take advantage of the Act's benefits, including advisory services and rental replacement supplements, at least ninety days before actually having to vacate.

Lastly, there is unanimous case support for the HUD view that the Uniform Relocation Act does not apply to persons displaced from *property already in the ownership* of the concerned agency, even though a notice to vacate for a project may be given. In *Harris v. Lynn*,⁴² the tenants seeking to qualify as "displaced persons" were required to move so that the ill-fated public housing projects of Pruitt-Igoe in St. Louis could be demolished. The tenants argued that

⁴¹ *Id.* § 4651(5) (emphasis added).

⁴² 411 F. Supp. 692 (E.D. Mo. 1976), *aff'd*, 555 F. 2d 1357 (8th Cir. 1977). It appears that the *Harris* courts treated "acquisition" in the "acquisition" clause and "acquiring agency" in the "notice" clause as functional equivalents, thus disposing of the majority's attempt to distinguish this case. Maj. op. at 12 & n. 29. Not only did the Court of Appeals "adopt the factual statement and legal reasoning" of the District Court, but also specifically stated, "The plaintiffs' eligibility for assistance, in essence, turned on the resolution of two issues: (1) whether there was an 'acquisition' for a program or project of a Federal Agency, and (2) whether the demolition was part of a comprehensive city demonstration program * * *." 555 F. 2d at 1360. The majority's efforts to distinguish *Harris*, like its efforts to distinguish *Alexander*, simply won't wash.

the projects were essentially "federal" lands, due to various loan and trust arrangements, and "that to deny relocation benefits to individuals forced to move from 'federal' lands while granting such benefits to those displaced as a result of the 'acquisition' of such lands would run counter to the Congressional purpose and intent."⁴³ The District Court agreed:⁴⁴

It is clear to us, however, that Congress advisedly limited the eligible class (in Section 4601(6)) to those forced to move as a result of an "acquisition." There are, for example, a number of references in the Act to "acquisition" and "acquiring agency."

Those tenants, although displaced-in-fact, were thus denied coverage because they had not moved as a result of an *acquisition* of their dwellings. On appeal the Eighth Circuit "adopt[ed] the factual statement and legal reasoning set forth in the District Court's opinion and affirm[ed] that decision as to the issues it reaches."⁴⁵

If, as the Eighth Circuit has maintained, Congress meant to provide coverage only for displacements connected with acquisitions, it would depart from that purpose to read the notice clause as the majority reads it here. Whenever an agency wishes to vacate property it already owns for some new "project or program," it presumably gives written notice to the occupying tenants. If that notice alone is said to qualify the tenants as "displaced persons," then the Act will be applying to all varieties of displacements that are not remotely related to "acquisitions." Based on the legislative history, other provisions of the stat-

⁴³ 411 F. Supp. at 695.

⁴⁴ *Id.* (emphasis added).

⁴⁵ 555 F. 2d at 1359.

ute, and available case law, I believe instead that in its definition of "displaced person" the Uniform Relocation Act is concerned with displacements from "acquisitions." And, thus, in this case, since the involuntary taking of the property due to default and foreclosure was not an "acquisition" for a "program or project," these appellees cannot be "displaced persons."

This was exactly what the Seventh Circuit held in *Alexander v. HUD, supra*. The court's description of plaintiffs' argument in *Alexander* neatly describes plaintiffs' argument here: "The tenants in this case contend that *Caramico* is distinguishable factually since in *Caramico* HUD was not the mortgagee, did not foreclose on the mortgage, and did not purchase the property from which the tenants were evicted. Further, plaintiffs argue *Caramico* involved the *acquisition aspect* of 42 U.S.C. § 4601(6), whereas here plaintiffs rely on the aspect of that section dealing with a *written order to vacate* by the acquiring agency."⁴⁶ The Seventh Circuit squarely and unanimously rejected this argument, the position of my two colleagues here, saying: "Although distinguishable with respect to particular facts, *Caramico* involved the same inquiry as presented by this case, i.e., whether the activity of the governmental agency was 'for a program or project undertaken by a Federal agency, or with Federal financial assistance.' In this case, we conclude that HUD's written order to the tenants of Riverhouse to vacate by December 31, 1974 was not for such a program or project."⁴⁷ No legal

⁴⁶ 555 F. 2d at 169 (emphasis supplied).

⁴⁷ *Ibid.*

legerdemain can distinguish the Seventh Circuit's holding in *Alexander* from the case at bar.⁴⁸

IV. OVERALL PURPOSE OF THE ACT

As the Seventh and Eighth Circuit cases and this case all illustrate, there may be persons displaced in fact from buildings already in the ownership of state or federal agencies who do not qualify as "displaced persons" even though the displacement results from a "program or project," *i.e.*, demolition. A reading of the definition as it was intended by the Uniform Relocation Act leads, as I have shown, to this conclusion. Before resting with this conclusion, however, it may be instructive to ask whether this outcome, excluding these appellees from coverage, is consistent with the overall structure of the Act, apart from whether it accords with the definition. After all, as the Act itself makes clear, a primary purpose is to assure that displaced persons "shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."⁴⁹ Is there any support in the Act, apart from the definition, for establishing coverage for persons displaced due to acquisitions for programs but denying coverage for persons displaced from property already owned by the agency?

Looking elsewhere in the Act, it appears that Congress made an express provision that certain persons displaced in fact by federal aid or a federal agency would be considered "displaced persons" *even though*

⁴⁸ The quoted sentence from *Alexander*, by which in note 27 the majority attempts to distinguish the Seventh Circuit case, constitutes simply an additional reason for a conclusion already reached on the *Caramico* rationale, as a reading of the whole opinion plainly shows.

⁴⁹ 42 U.S.C. § 4621 (1970).

the displacement may not have resulted from acquisition. As set out in full below, section 217 of the Act⁵⁰ provides that persons who have to move as a result of certain federal aid programs involving urban renewal shall, "for the purposes of this [title], be deemed to have been displaced as the result of the acquisition of real property." In other words, under these named programs there may be extensive displacement, from public housing projects, for example, without any federal or federally-financed state acquisition of real property. Section 217, therefore, is designed to cover displacements caused by these named activities even though there was no acquisition. This section does what Congress did not do in the section at issue here, and rather completely refutes the majority claim "that if Congress had explicitly considered * * *, it would have approved an interpretation of the Act making benefits available for such persons."⁵¹ Congress did so—when it desired to do so.

If the notice clause had the meaning given it by the majority, it would have been completely unnecessary for Congress to have enacted section 217. The persons displaced by these urban renewal programs would undoubtedly have been given notices to vacate "for" these projects and would have been qualified under

⁵⁰ 42 U.S.C. § 4637 (1970) : "A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property."

⁵¹ Maj. op. at 16.

the notice clause, as the majority reads it. The fact, however, that Congress had to provide special coverage for these persons suggests that it did not intend that all persons displaced from property already owned by an agency would be eligible for benefits. The fact that Congress provided special coverage as to certain named programs also suggests that it is for Congress to decide when to extend coverage to other persons displaced from property already owned. There may be reasons of equity or policy for the Uniform Relocation Act to reach *all* persons displaced as a result of federal programs, regardless of whether their property is acquired or already owned by the relevant agency. But as the Act is now structured we are obliged to follow the definition as phrased and as intended and to leave questions of additional coverage to Congress.

As a closing note of caution, I would ask the majority to consider the consequences of what may well have happened here had HUD accepted the meaning of the notice clause as the majority has interpreted it now. If HUD knew that once it acquired a building with tenants, however involuntary the acquisition, these tenants would become "displaced persons" if HUD ever served them with notice to vacate "for" another project, then what could very likely have been the HUD response? *HUD might well have insisted*, as it had every legal right to do, *that the mortgagee evict all the tenants before* HUD would accept the property and pay out the mortgage insurance. Being evicted by the mortgagee, the tenants would clearly not have been "displaced persons" according to the interpretation in *Caramico* and even more squarely on point in *Alexander*.⁵² In brief, as the notice definition

⁵² See also *Moorer v. HUD* (No. 76-1830, 8th Cir. 9 September 1977).

now stands in this Circuit, there will be greater incentive for HUD to *insist upon taking title without tenants in occupancy*, thereby avoiding what it regards as the "substantial" financial burden of the majority's interpretation.⁵³ The irony of the result in this case is that the majority may be hurting the urban poor among the displaced more than helping them.

V. CONCLUSION

In summary, I agree with the Second Circuit in *Caramico v. HUD*, with the Eighth Circuit in *Harris v. Lynn*, and with the Seventh Circuit in *Alexander v. HUD*. All three of our sister circuits have held that where there is an involuntary acquisition of property by HUD the evicted tenants are not "displaced persons" within the meaning of the Act. My colleagues have tried valiantly to distinguish *Caramico* by saying it clearly turned upon the "acquisition" clause defining "displaced persons," but the Eighth Circuit in *Harris v. Lynn* and the Seventh Circuit in *Alexander v. HUD* dealt with the "notice" clause definition of displaced persons, which is involved in our case. In each instance the Court of Appeals unanimously affirmed a District Court reaching the decision I would reach here. In light of the analysis of the statute in these three cases by twelve federal judges, and the unanimous conclusion reached in each case, I respectfully suggest that the reasons advanced by my two colleagues here are unpersuasive, certainly inadequate to overcome the weight of both reason and authority manifested in the other three circuits. I therefore respectfully dissent.

⁵³ HUD Brief at 21-23.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1977

(No. 75-2268)

SADIE E. COLE,

v.

PATRICIA ROBERTS HARRIS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., APPELLANTS

(No. 75-2269)

SADIE E. COLE, ET AL., APPELLANTS

v.

PATRICIA ROBERTS HARRIS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, *Chief Judge*, McGOWAN AND WILKEY, *Circuit Judges*.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for

the District of Columbia and were argued by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein are hereby affirmed in part and reversed in part, in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court,

GEORGE A. FISHER,

Clerk.

Date: November 14, 1977.

Opinion for the Court filed by Chief Judge Bazelon.
Dissenting opinion filed by Circuit Judge Wilkey.

APPENDIX C

United States District Court for the District of Columbia

(Civil Action No. 74-1872)

SADIE E. COLE, ET AL., PLAINTIFFS

v.

CARLA A. HILLS, ET AL., DEFENDANTS

Order

Upon consideration of the complaint, the motions of the parties for partial summary judgment respecting plaintiffs' claim for relief based upon the Uniform Relocation Assistance and Real Property Acquisition and Policies Act of 1970, 42 U.S.C. 4601 *et seq.* (hereinafter referred to as "the Act"), the memoranda of points and authorities, exhibits and argument of counsel in support thereof and in opposition thereto and the Court being advised in the premises, it is by the Court this 12th day of September, 1975, pursuant to 28 U.S.C. 2201.

Declared and adjudged that by having come into possession of the Sky Tower Apartment project as the result of a mortgage default, HUD was "the acquiring agency" within the meaning of the Act; and it is further

Declared and adjudged the notices of September 27, 1974 advising Sky Tower tenants to vacate were the "written order of the acquiring agency to vacate real

property" within the meaning of the Act; and it is further

Declared and adjudged the notices aforesaid were "for a program or project undertaken by a federal agency" within the meaning of the Act, to wit, the demolition of Sky Tower; and it is further

Declared and adjudged that all persons who were tenants at Sky Tower as of September 27, 1974 and vacated their apartments on or after that date and prior to August 1, 1975 are "displaced persons" to whom the Act's benefits are available; and it is finally

Declared and adjudged said tenants who vacated their apartments as a result of the notice of September 27, 1974 are entitled to a prorated portion of the benefits provided under Section 204 of the Act for the period commencing upon the date of their move from Sky Tower and terminating August 1, 1975 (or the date on which any such person returned to Sky Tower, if earlier than August 1, 1975), by which dates the availability of apartments at Sky Tower for tenants shall be deemed to constitute provision of comparable relocation housing as required by sections 205(e)(3) and 204(1) of the Act, so as to waive the provisions of any other benefits under the Act to said tenants; and it is

Ordered that, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby directs entry of a final judgment as to this one of several claims of the plaintiffs, there being no just reason for delay.

The reasons for the certification under Rule 54(b) (see *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 3rd Cir., July 10, 1975), are as follows:

1. The adjudicated and unadjudicated claims are separate and distinct.

2. There is no possibility that the need for review will be mooted by future developments in the district court.

3. There is no possibility that the reviewing court will have to consider the issue a second time.

4. No claim or counterclaim has been presented which could result in set-off against the judgment sought to be made final.

5. The issue defendants have raised is of general public importance warranting prompt appellate disposition, and is certainly not frivolous; to some extent this is a case of first impression; and the needs of plaintiff class warrant reaching a final disposition of this issue without awaiting determination of the other issues in the litigation.

The Court accepts defendants' understanding that, because this order provides for declaratory rather than injunctive relief, defendants are not required to make payments hereunder pending final decision on appeal.

GERHARD A. GESELL,
United States District Judge.

